

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
WARREN C. HAVENS)	File Nos. 852997-853009
)	
For Authorization to Operate Automated)	
Maritime Telecommunications System Stations)	
at Various Locations in Texas)	

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2002**Released: September 18, 2002**

By the Commission:

I. INTRODUCTION

1. On November 13, 2001, Warren C. Havens (Havens) filed an application for review of the October 12, 2001 *Order on Reconsideration* of the Wireless Telecommunications Bureau, Public Safety and Private Wireless Division (Division).¹ The *Order on Reconsideration* denied Havens's petition for reconsideration of an earlier Division *Order* that dismissed the above-captioned applications to operate Automated Maritime Telecommunications System (AMTS) stations at various locations in Texas.² On January 4, 2002, Havens filed a petition for declaratory ruling that was placed into the record of this proceeding. For the reasons that follow, the application for review is denied and the petition for declaratory ruling is dismissed.

II. BACKGROUND

2. AMTS stations provide automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system for tugs, barges, and other maritime vessels.³ Under Section 80.475(a) of the Commission's Rules, AMTS applicants who propose to serve a navigable inland waterway that is less than 150 miles in length must serve that waterway in its entirety.⁴ On the other hand, AMTS applicants who propose to serve a navigable inland waterway that is more than 150 miles in length must provide continuity of service along at least 60 percent of the waterway.⁵ The Commission adopted these requirements, in

¹ Warren C. Havens, *Order on Reconsideration*, 16 FCC Rcd 18046 (WTB PSPWD 2001) (*Order on Reconsideration*).

² Warren C. Havens, *Order*, 16 FCC Rcd 2539 (WTB PSPWD 2001) (*Order*).

³ See, e.g., Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS), *First Report and Order*, GEN Docket No. 88-732, 6 FCC Rcd 437, 437 ¶ 3 (1991) (*AMTS First Report and Order*).

⁴ 47 C.F.R. § 80.475(a) (2001).

⁵ *Id.*

1991, as a means to ensure that there is interoperability over a major portion of one or more waterways.⁶ Finally, waterways that can be covered by a single station are ineligible for AMTS service.⁷

3. *Thirteen Applications.* On February 24, 2000, the Commission gave public notice of Havens's thirteen captioned applications to operate AMTS stations on channel block B.⁸ These applications requested authority to serve three waterways in Texas, as follows: six applications for AMTS stations that would serve 236 miles, or 55.5 percent, of the 425-mile Trinity River;⁹ four applications for AMTS stations that would serve 87.5 miles, or 43.7 percent, of the 200-mile San Antonio River;¹⁰ and three applications for AMTS stations that would serve 120 miles, or 42 percent, of the 286-mile Lower Colorado River.¹¹

4. *Order.* While Havens conceded that he proposed to serve less than 60 percent of each waterway, he argued that the applications nonetheless satisfied the coverage requirement set forth in Section 80.475 of the Commission's Rules. Havens explained that in each case he was proposing to serve 100 percent of the waterway that could be served without causing interference to the previously licensed, co-channel AMTS stations of Waterway Communications System, Inc. (Watercom).¹² The Division rejected this argument, and on January 31, 2001, dismissed the above-captioned applications because they did not propose 60 percent coverage of the entire Trinity River, Lower Colorado River, or San Antonio River.¹³

5. *Order on Reconsideration.* On March 2, 2001, in his petition for reconsideration, Havens argued that the service coverage requirement (Section 80.475(a))¹⁴ would be satisfied if the tributaries of the three rivers were taken into account.¹⁵ The Division rejected that argument because tributaries are routinely and consistently treated as separate waterways for purposes of the AMTS rules.¹⁶ Havens also

⁶ See *AMTS First Report and Order*, 6 FCC Rcd at 440 ¶ 25.

⁷ See Fred Daniel d/b/a Orion Telecom, *Memorandum Opinion and Order*, 14 FCC Rcd 19912, 19916-17 ¶ 10 (1999).

⁸ See Wireless Telecommunications Bureau Weekly Receipts and Disposals, Report No: 2081 (rel. Feb. 24, 2000).

⁹ FCC File Nos. 852997-853002, Supplemental Statement in Support of Applications Filed by Warren C. Havens to Serve the Trinity River with Six AMTS Radio Stations, at 4 (dated Jan. 24, 2000).

¹⁰ FCC File Nos. 853003-853006, Supplemental Statement in Support of Applications Filed by Warren C. Havens to Serve the San Antonio River with Four AMTS Radio Stations, at 4 (dated Jan. 24, 2000).

¹¹ FCC File Nos. 853007-853009, Supplemental Statement in Support of Applications Filed by Warren C. Havens to Serve the Lower Colorado River with Three AMTS Radio Stations, at 4 (dated Jan. 24, 2000).

¹² *Order*, 16 FCC Rcd at 2540 ¶ 3. Watercom argued in a petition to deny Havens's applications that the proposed stations would cause interference to its stations located near the Texas coastline unless there was a 150-mile separation. *Id.* at 2541-42 ¶ 5. In rejecting this argument, the Division expressed concern that requiring overly conservative co-channel interference protection would be spectrally inefficient. *Id.*

¹³ *Id.* at 2542 ¶¶ 6-7.

¹⁴ 47 C.F.R. § 80.475(a) (2001).

¹⁵ *Order on Reconsideration*, 16 FCC Rcd at 18047 ¶ 4.

¹⁶ *Id.* citing Amendment of Parts 2, 81 and 83 of the rules to add the Gulf Intracoastal Waterway to the authorized service area of Inland Waterways Communications Systems, *Report and Order*, GEN Docket No. 81-822, 51 R.R. 2d (P&F) 440, 443 ¶ 15 (1982) (indicating that "adjacent lakes, bays, feeder canals and the like" are not part of a waterway for purposes of the AMTS (formerly IWCS) coverage requirement, but may be served pursuant to the rule now codified at 47 C.F.R. § 80.477(c) (AMTS service may be provided to any vessel within communication service range of an AMTS station even though the vessel may not be operating within the confines of a served waterway)); see also 47 C.F.R. § 81.913(a) (1982) (setting out Mississippi River and its tributaries as separate waterways).

argued that his applications should be treated similarly to certain Regionet Wireless Licensee LLC (Regionet) applications,¹⁷ which he contends did not comply with the service coverage requirement but were nonetheless granted.¹⁸ In rejecting this argument, the Division noted that it was reasonable to conclude that the granted applications were extensions of Regionet's existing West Coast system.¹⁹ In this connection, the Division observed that Regionet is allowed to provide coverage to these inland waterways because Section 80.477(c) expressly permits service to vessels operating beyond the served waterway.²⁰ Finally, the Division rejected Havens's argument that its interpretation of the service coverage requirement is contrary to the rule's underlying intent.²¹

6. On November 13, 2001, Havens filed the instant application for review. On November 28, 2001, Regionet filed an opposition and on December 12, 2001, Havens filed a reply. On January 4, 2002, Havens filed a petition for a declaratory ruling on whether the Division complied with Section 309 of the Communications Act of 1934, as amended, when it dismissed the above-captioned applications as opposed to designating them for hearing.²² This petition was not captioned under the instant proceeding and did not include a certificate of service on Regionet. In this connection, on April 17, 2002, the Division concluded that this petition for declaratory ruling appeared to be a prohibited *ex parte* presentation that should be made part of the record of this restricted proceeding and served it on Regionet.²³

III. DISCUSSION

7. Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission.²⁴ The Commission may grant the application for review in whole or in part, or it may deny the application with or without specifying reasons therefor.²⁵ No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.²⁶

¹⁷ Watercom and Regionet are both controlled by Mobex Communications, Inc. *See, e.g.*, Transfer of Control from Waterway Communications System, Inc. to Mobex Communications, Inc. (granted July 13, 2000); Transfer of Control from Regionet Wireless License, LLC to Mobex Communications, Inc. (granted Feb. 23, 2000).

¹⁸ *Order on Reconsideration*, 16 FCC Rcd at 18048 ¶ 5.

¹⁹ *Id.*

²⁰ *Id.* (citing 47 C.F.R. § 80.477(c)).

²¹ *Id.* at 18048 ¶ 6.

²² Petition for Declaratory Ruling Concerning Requirements of Section 309 of the Communications Act of 1934, as Amended, as Applied to AMTS Application Denials (dated Jan. 4, 2002). Havens addressed this petition to the Chief of the Wireless Telecommunications Bureau. In addition to the above-captioned applications, the petition also cited Havens's dismissed applications to serve the portion of the Arkansas River known as the Arkansas Headwaters. *See* Applications of Warren C. Havens, *Order on Further Reconsideration*, 16 FCC Rcd 19240 (WTB 2001); *see also* Applications of Warren C. Havens, *Order on Further Reconsideration*, 16 FCC Rcd 9337 (WTB PSPWD 2001); Applications of Warren C. Havens, *Order*, 15 FCC Rcd 22296 (WTB PSPWD 2000).

²³ *See* Letter from Ramona E. Melson, Deputy Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau to John Reardon, Esquire, Mobex Communications, Inc. (dated Apr. 17, 2002). The Division served the petition for declaratory ruling on Regionet in accordance with 47 C.F.R. § 1.1212.

²⁴ 47 C.F.R. § 1.115(a).

²⁵ 47 C.F.R. § 1.115(g).

²⁶ 47 C.F.R. § 1.115(c).

8. Havens argues that the Division's interpretation of the AMTS 60-percent service coverage requirement is anticompetitive because it results in only the incumbent licensee, Watercom, being able to propose AMTS service to the waterways at issue.²⁷ He suggests that a "reasonable and rational" interpretation of the service coverage requirement would permit the grant of his applications.²⁸ In this connection, Havens refers to the "substantial service" standard that the Commission adopted for several of the Private Land Mobile Radio Services, governed under Part 90 of our rules. Specifically, Havens notes that for the 800 MHz Specialized Mobile Radio²⁹ and certain 220-222 MHz band channels,³⁰ the Commission recognized "substantial service" as an alternative for geographic area licensees who could not satisfy the Part 90 population service coverage requirement because of incumbent operations.³¹ Havens contends that we should ensure a similar result for his AMTS applications.³²

9. We disagree. As a preliminary matter, the "substantial service" argument is raised for the first time in the application for review. As such, Havens is barred from presenting it for our consideration at this juncture because it could have been but was not presented to the Division.³³ Thus, we will not treat the substance of this particular Havens argument here.³⁴ Next, we find Havens's claim that the Division should have interpreted the 60 percent coverage requirement as being satisfied when there is 100 percent coverage of the available portion of the waterway to be unpersuasive. Section 80.475(a) provides that AMTS applicants who propose to serve a navigable inland waterway that is more than 150 miles in length must provide continuity of service along at least 60 percent of the waterway.³⁵ Havens acknowledges both that he did not propose to serve at least 60 percent of each waterway and that Section 80.475(a) does not contain a "substantial service" option.³⁶ We also note that Havens did not request a waiver of Section 80.475(a), pursuant to the criteria set forth in 47 C.F.R. § 1.925, at any point during this proceeding. Accordingly, we find no error by the Division, and decline to address Section 1.925 of our Rules *sua sponte*.³⁷

²⁷ Application for Review at 7-8. Havens emphasizes that while he does not suggest that the rule is anticompetitive, "the 60 percent rule has an anticompetitive effect when coupled with the requirement for incumbent protection and the [Division's] application of the rule." *Id.* at 8.

²⁸ *Id.*

²⁹ Application for Review at 6-7 n.7 citing Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order on Reconsideration*, PR Docket No. 93-144, 14 FCC Rcd 17556, 17568 ¶ 18 (1999).

³⁰ *Id.* at 7 n.8 citing Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order; Fifth Notice of Proposed Rule Making*, PR Docket No. 89-552, 12 FCC Rcd 10943, 11020 ¶ 163 (1997).

³¹ *Id.* at 5-8.

³² *Id.* at 8, 10.

³³ See 47 C.F.R. § 1.115(c).

³⁴ In any event, we believe that Havens's reliance on "substantial service" options under Part 90 is misplaced because these Part 90 provisions apply to licensees granted authority for a given geographic area, whereas Havens's captioned applications are for site-based authority. Moreover, we recently concluded that the AMTS service differs from the 800/900 MHz Specialized Mobile Radio service with respect to how they should be licensed. See Amendment of the Commission's Rules Concerning Maritime Communications, *Second Memorandum Opinion and Order and Fifth Report and Order*, PR Docket No. 92-257, 17 FCC Rcd 6685, 6707 ¶ 49 n.211 (2002) (*Second MO&O and Fifth R&O*).

³⁵ 47 C.F.R. § 80.475(a) (2001).

³⁶ Application for Review at 8.

³⁷ Recently, after notice and comment, the Commission adopted revisions to Section 80.475(a) and other Part 80 AMTS rules under which AMTS licenses will be granted by geographic area with a substantial service coverage (continued....)

10. Turning to Havens's claim that Regionet has received favorable licensing treatment, Havens refers to certain Regionet applications which he contends did not comply with the service coverage requirements but were nonetheless granted improperly under Section 80.477(c) of the Commission's Rules.³⁸ We note that Havens has offered no evidence that would cause us to differ with the Division's judgment that it was reasonable for the staff to conclude that the Regionet applications were properly granted as extensions of Regionet's existing West Coast system. Contrary to what Havens contends,³⁹ the Division did not suggest in the *Order on Reconsideration* that the subject Regionet extensions were granted under Section 80.477(c). Rather, the Division suggested that if stations authorized to serve the West Coast also were capable of providing coverage to portions of certain inland waterways, such coverage was permitted under Section 80.477(c).⁴⁰ Finally, we agree with the Division that to the extent that granting any of these Regionet applications could have been erroneous, as Havens alleges, such error would provide no basis for granting Havens's captioned applications.⁴¹

11. In his application for review, Havens argues that the captioned applications to serve 43.7 percent of the San Antonio River should now be treated as applications to serve 100 percent of the Cibalo Creek, a tributary of the San Antonio River.⁴² We note, however, that Havens's applications suggested that the proposed stations were meant to serve the San Antonio River.⁴³ Subsequently, his petition for reconsideration suggested that Cibalo Creek would receive full coverage, but only when arguing that the applications to serve the San Antonio River would satisfy the service coverage requirement if the mileage of the San Antonio River and the mileage of certain tributaries were combined.⁴⁴ By comparison, Havens now argues in the application for review that the San Antonio River applications should be treated as applications to serve the Cibalo Creek. This is a completely new argument for why the applications should have been granted. Havens offers no explanation for failing to properly raise this argument to the Division or to request a waiver of Section 1.115(c) of the Commission's Rules. Accordingly, we find that this argument is barred at this juncture because it was not presented first to the Division.⁴⁵

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requirement. See *Second MO&O and Fifth R&O*, note 34, *supra*. We believe this action could be viewed as consistent with the policy considerations that Havens presented herein. Nonetheless, it also demonstrates that the Division did not "misinterpret" the 60-percent coverage rule that governed the captioned applications.

³⁸ Application for Review at 9-11.

³⁹ See *id.* at 10 ("Section 80.477(c) does not even remotely suggest that additional stations can be added for the sole purpose of expanding coverage into inland waterways. That is purely a staff interpretation that cannot stand muster.").

⁴⁰ *Order on Reconsideration*, 16 FCC Rcd at 18048 ¶ 5.

⁴¹ *Id.*; see also Applications of Fred Daniel d/b/a Orion Telecom, *Order on Reconsideration*, 14 FCC Rcd 1050, 1055 n.43 (WTB PSPWD 1999) (citing Quinnipiac College, *Memorandum Opinion and Order*, 8 FCC Rcd 6285, 6286 ¶ 12 (1993)) (erroneous grant of previous application does not provide a grounds for approving subsequent defective applications).

⁴² See Application for Review at 11.

⁴³ See, e.g., FCC File Nos. 853003-006; see Supplemental Statement in Support of Applications Filed by Warren C. Havens to Serve the San Antonio River with Four AMTS Radio Stations at 4-6 (dated Jan. 24, 2000).

⁴⁴ Petition for Reconsideration at 16. The tributaries identified were the Cibalo Creek as well as the waterway that connects Calaveras Lake to the San Antonio River).

⁴⁵ See note 26, *supra* and accompanying text. See also Charles T. Crawford, *Order*, 17 FCC Rcd 2014, 2017-18 ¶ 10 (2002).

12. In the alternative, Havens once again argues that the applications should be granted because if tributaries are taken into account, the proposed stations would satisfy the coverage requirement for the specified waterways.⁴⁶ He states that the Army Corp of Engineers and the State of Texas have determined for purposes of major recreational navigable uses that the subject waterways include the identified tributaries.⁴⁷ We reach the same conclusions as the Division in the *Order on Reconsideration*.⁴⁸ We reject Havens's method of calculating the length of a particular navigable inland waterway for purposes of determining whether the AMTS coverage requirement is met. The requirement of 60 percent service coverage, by its express terms, applies to "each of one or more navigable inland waterways"⁴⁹ and not to the combined mileage of the waterway and any applicant-selected tributaries. Moreover, as a general matter, the Commission has routinely and consistently treated tributaries as separate waterways for purposes of the AMTS rules.⁵⁰

13. Finally, on January 4, 2002, Havens filed a separately captioned petition requesting that the Chief, Wireless Telecommunications Bureau, issue a declaratory ruling on whether the Division complied with Section 309 of the Communications Act of 1934, as amended, when it dismissed the captioned applications without designating them for hearing.⁵¹ We agree with the Division, however, that the petition for declaratory ruling is in fact a collateral attack on the Division's actions in the *Order* and *Order on Reconsideration*, and is properly considered a part of the record of the proceeding now before us.⁵² In this connection, we find that the petition is barred under Section 1.115(d) as an untimely supplement to the instant application for review.⁵³ Moreover, relative to the captioned applications, the petition also is barred under Section 1.115(c) because the designated authority, the Division, has been afforded no opportunity to address the merits of the Section 309 argument.⁵⁴ Furthermore, this infirmity cannot be cured simply by addressing the petition to the Chief, Wireless Telecommunications Bureau, because Havens offers no explanation for failing to timely raise this argument to the Division within the statutory thirty-day period for seeking reconsideration of the *Order*.⁵⁵ For the foregoing reasons, we find that Havens's Section 309 claim is precluded herein.⁵⁶

⁴⁶ Application for Review at 12-16. Specifically, with regard to the Trinity River and the associated connecting waterways he identifies (Clear Fork, West Fork, Elm Fork, and East Fork), Havens argues that 407 of the combined 596 miles are covered (68 percent). With regard to the Lower Colorado River and the associated connecting waterways he identifies (Lake Travis, Pedernales River, Town Lake, Lake Austin, the waterway that connects Walter E. Long Lake to Lower Colorado River, and the waterway that connects Lake Bastrop to Lower Colorado River), he argues that 276 of the combined 442 miles are covered (62.4 percent). With regard to the San Antonio River and the associated connecting waterways he identifies (Cibalo Creek, and the waterway that connects Calaveras Lake to San Antonio River), he argues that 183.5 of the combined 296 miles are covered (62 percent).

⁴⁷ *Id.* at 13.

⁴⁸ *Order on Reconsideration*, 16 FCC Rcd at 18047 ¶ 4.

⁴⁹ 47 C.F.R. § 80.475(a).

⁵⁰ See note 17, *supra*.

⁵¹ See note 22, *supra* and accompanying text.

⁵² See note 23, *supra* and accompanying text.

⁵³ With exceptions not relevant, Havens's application for review and any supplemental thereto had to be filed within 30 days of October 12, 2001, the release date of the *Order on Reconsideration*. See 47 C.F.R. § 1.115(d).

⁵⁴ 47 C.F.R. § 1.115(c).

⁵⁵ See 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

⁵⁶ We note that Section 309(e) requires an evidentiary hearing if a substantial and material question of fact is presented, or if the Commission is unable to make the finding of whether the public interest, convenience, and necessity will be served by the granting of the application. 47 U.S.C. § 309(e). The D.C. Circuit has stated that the decision of whether or not hearings are necessary or desirable is a matter in which the Commission's discretion and

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IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 5(c), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 303(r), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the application for review filed by Warren C. Havens on November 13, 2001, IS DENIED.

15. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 5(c), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 303(r), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the petition for declaratory ruling filed by Warren C. Havens on January 4, 2002, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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expertise is paramount. *See United States of America v. Federal Communications Commission*, 652 F.2d 72, 91 (D.C. Cir. 1980). The D.C. Circuit has further stated that the Commission is not required to hold hearings in matters where the ultimate decision will not be enhanced or assisted by the receipt of evidence. *Id.* For example, if it is undisputed that an application is not in accordance with the rules, then there is no substantial and material question of fact that would necessitate a hearing.